

RETHINKING COOPERATION AMONG JUDGES IN MASS TORT LITIGATION

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INTRODUCTION

Recent efforts by judges to cooperate with each other in achieving common goals of improved dispute resolution in mass tort litigation are receiving increasing attention.¹ It is now commonplace for one judge to

* Professor of Law, Duke University. Great appreciation is due to the many federal and state judges with whom I have worked over the last fifteen years. In particular, the members of the Mass Tort Litigation Committee of the Conference of Chief Justices, and Judges Charles Wolle, Jack Weinstein, Robert Parker, Sam Pointer, and Patrick Higginbotham. Their counsel has cut in many directions. Peter W. Morgan and Ann Tyrell Cochran have assisted with brief but timely comments, and Scott Abrahamson has been notable in his tolerance and perseverance.

1. See generally FEDERAL JUDICIAL CTR., *MANUAL FOR COMPLEX LITIGATION* (3d ed. 1995); FEDERAL JUDICIAL CTR., *MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS* (1997) [hereinafter *MANUAL FOR COOPERATION*]; JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995); William W. Schwartz et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992);

ask another judge to assist in settling a case. Federal and state judges sit together in handling cases that arise out of the same set of facts. One court may defer resolving a case until similar issues are decided by another court.

On the other hand, there are instances in which efforts at judicial cooperation have failed.² Judges have attempted to sit together to resolve cases only to find that they must go their separate ways. Judges have sought to preempt other judges by the use of preclusive rulings creating a more divisive dispute than previously existed. In addition, some judges have sought alliances with other judges that have resulted in arguably extralegal maneuvering.

Our appreciation of the benefits of cooperation among judges is increasingly obvious. These benefits parallel the strengths of cooperation among adversaries: savings in cost and time, quality of outcomes, and increased satisfaction and fairness. What has been most notably lacking is: (1) an appreciation of the downside of cooperation among judges, and (2) a means for determining whether the benefits of judicial cooperation outweigh the risks. The lack of attention to the relative merits of cooperation among judges can be explained by the paucity of information concerning the precise nature of the interaction among judges, relatively little explicit analysis of the more novel issues of process, federalism, fairness, and ethics that are raised during judicial cooperation, and the absence of well-defined yardsticks to measure the overall value of cooperative efforts among judges. We cannot apply the normative calculus we use to examine cooperation among adversaries in litigation to cooperation among judges; we need a quite different approach.

This Article begins with an overview of mass tort cases in which judges have fostered cooperation with greater or lesser success. It then examines specific examples of cooperation among judges in the asbestos and silicone gel breast implant litigation and presents practical rules induced from these examples. Finally, it discusses the normative concerns arising from judicial cooperation and suggests guidelines for determining the appropriateness of such cooperation in the future.

This discussion of cooperation among judges gives rise to what can best be described as an exuberant skepticism as one realizes that this form of

Symposium, *National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1655 (1992).

2. See, e.g., *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982), *vacated*, 680 F.2d 1175 (8th Cir. 1982); Symposium, *Civil Litigation in Mass Disasters: The Hyatt Skywalk Collapse*, 52 UMKC L. REV. 141 (1984) [hereinafter Symposium, *Hyatt Skywalk Collapse*] (addressing the legal issues arising in the wake of the July 17, 1981 collapse of the Skywalk at the Hyatt Regency Hotel in Kansas City, Missouri).

cooperation has an enormous upside that should be carefully nurtured, while remaining cognizant of an incompletely understood downside that deserves equal attention.

I. CASE MANAGEMENT AND JUDICIAL COOPERATION IN MASS TORT LITIGATION

Cooperative procedures among judges in different types of mass tort cases can best be appreciated by disaggregating the varieties of mass torts.³ There has been a tendency to classify all mass tort litigation into one category for purposes of case management analysis. Efforts at achieving a more precise taxonomy of mass torts have focused on the following: the number of plaintiffs, the locus of harm, the jurisdiction in which cases are brought, the lag time between the instigation of the harm and the manifestation of the harm, the time frame for the production of harms, and the mechanism of the harm itself. Thus, airplane accidents, toxic exposure cases, latent disease cases, and drug cases have been viewed as different. Although these factors are critical in understanding the nature of the mass tort, they have not been particularly helpful in informing case management. The suggestion here is that classifying mass tort actions using the following four separate variables provides an appropriate taxonomy for selecting a case management approach suitable for a particular mass tort.

The four critical variables for classifying mass torts are: (1) liability; (2) specific causation; (3) value; and (4) funding. *Liability* refers to issues of defect, state of the art, general causation, and others that are prerequisites to a finding of liability against any defendant. *Specific causation* refers to the individual issues of exposure to a product and the causation of a specific harm to a specific plaintiff. *Value* is the dollar amount that a settlement or jury verdict awards to a plaintiff's case. *Funding* is the availability of money for compensation. These variables can be relatively well-determined or known prior to litigation, or uncertain because of the lack of precise information. So, for example, a given mass tort may involve either general knowledge that there is liability, specific causation, value, and funding, or uncertainty concerning one or more of these variables.

This proposed taxonomy is, admittedly, overly simplistic, but it can be quite helpful in analyzing circumstances for judicial cooperation. Although there are sixteen permutations of these variables, the following five combi-

3. See Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995).

nations of variables illustrate the bulk of existing mass tort cases and signal the kinds of approaches that seem to be successful in each context.

A. Known Liability, Known Specific Causation, Uncertain Value, and Known Funding

The classic examples of mass torts in which there is known liability, known specific causation, uncertain value, and known funding are aircraft crash cases and building catastrophe cases.⁴ Although there may be some uncertainty concerning which defendants are liable and thus subject to somewhat different treatment, the assumption here is that there is at least one solvent defendant who is liable and there is no doubt that the incident caused the harm to individual plaintiffs. The sole issue that remains uncertain is the value of each case.

Cooperation among judges in these types of cases is the norm rather than the exception.⁵ Generally, there is some type of consolidation of cases among federal judges, either through multidistrict litigation or Rule 42,⁶ and an informal agreement with state judges concerning the resolution of all cases. In some instances, state and federal judges will sit together; in other instances, one court will defer to the other until common issues have been resolved and can be applied consistently. The members of the bar also tend to cooperate with each other, in part because of the specialized nature of their practice and their role as repeat players. If cases are filed in a number of jurisdictions, there may be more of a problem, particularly if there are vast differences in the substantive law of damages. Generally speaking, however, the current system works quite well. Proposals for legislative reform (such as bills to allow consolidation of all cases arising out of a single accident into the federal courts) have been viewed as unnecessary.

4. See, e.g., *Airline Disaster Litig. Report*, 127 F.R.D. 405 (N.D. Ill. 1988); *In re Beverly Hills Fire Litig.*, 639 F. Supp. 915 (E.D. Ky. 1986); *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913 (D. Nev. 1983); *In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, 128 F.R.D. 131 (J.P.M.L. 1989); *In re Air Crash Disaster at Fla. Everglades* on Dec. 29, 1972, 368 F. Supp. 812 (J.P.M.L. 1973); ABA Comm. on Mass Torts, *Revised Final Report and Recommendations to the Commission on Mass Torts*, in REPORT TO THE HOUSE OF DELEGATES (1989); Schwartz, *supra* note 1, at 1704 (discussing the April 23, 1987 collapse of the L'Ambiance Plaza, a high-rise building under construction in Bridgeport, Connecticut).

5. See Schwartz, *supra* note 1, at 1700-06.

6. FED. R. CIV. P. 42.

B. Uncertain Liability, Known Specific Causation, Uncertain Value, and Known Funding

Some aircraft crash cases and building fire or collapse cases fall into a slightly different category when some or all of the defendants face uncertain liability. Even with this added complication, there have been some notable examples of cooperation among judges. In the Bridgeport, Connecticut apartment building collapse case, one federal and one state judge were officially appointed as settlement judges and acted informally to resolve the litigation.⁷ First, they determined the amount of funds necessary; they then analyzed the various sources of funds and competing interests for those funds. In this analysis, they focused upon innovative bargains that might maximize gains for both sides. For example, administrative law penalties were added to the compensation pot, and ownership of the building itself was added to their calculus. The ultimate conclusion was a resolution of cases more expeditious and efficient than would normally have been anticipated.

However, other instances of attempts at cooperation in this category have seen less success. In the Hyatt Skywalk litigation, for example, an attempt was made to centralize all cases in federal court in a mandatory class action.⁸ Attorneys who disagreed with this approach, including the selection of lead plaintiffs and counsel, successfully fought the process and most of the cases were resolved in state court.

C. Known Liability, Uncertain Specific Causation, Known Value, and Known Funding

The “mature” mass tort⁹ involves situations in which, for example, there have been multiple trials in multiple jurisdictions with a consensus that the product—at least in a given set of circumstances—is unreasonably dangerous and a solvent defendant is liable for particular types of harms. The uncertainty lies in the issues of exposure, specific causation, and individual harm. Interstate and intrafederal cooperation has become routine in these types of cases.¹⁰ It is not uncommon for one judge to coordinate all

7. See Schwartz, *supra* note 1, at 1704, 1715–18.

8. See Symposium, *Hyatt Skywalk Collapse*, *supra* note 2.

9. See Francis E. McGovern, *Resolving Mature Mass Torts Litigation*, 69 B.U. L. REV. 659 (1989).

10. See MANUAL FOR COOPERATION, *supra* note 1.

the asbestos cases in a given jurisdiction and then assign them for trial to other judges when necessary. In the Northern District of Ohio, for example, Judge Thomas D. Lambros has used a variety of judges from the Sixth Circuit to process a large docket of asbestos cases that he has organized by voluntarily having them assigned to himself.¹¹ Likewise, in Philadelphia and Baltimore, Judges Sandra Moss and Marshall Levin have achieved a high level of cooperation among judges to resolve their cases.¹²

In the Dalkon Shield cases, however, a coordination effort by Judge Robert Merhige, Jr. of the Eastern District of Virginia among federal judges across the country ran into resistance from some courts. It was not until the A. H. Robins Company filed for bankruptcy before Judge Merhige that these cases were consolidated.¹³

There has been less success in coordination between federal and state judges for the resolution of these types of cases. Efforts were made in Cleveland and New York to have joint hearings and trials, but differences in state and federal procedure, evidence, and legal interpretations have inhibited extensive joint action.¹⁴

D. Uncertain Liability, Uncertain Specific Causation, Uncertain Value, and Known Funding

Most toxic substances cases arising from waste sites fall into the third category. A chemical or series of chemicals may be implicated in causing large numbers of harms, but there is usually substantial debate concerning whether the products were either unreasonably dangerous or capable of causing the alleged harms. Likewise, there is usually significant controversy whether any given plaintiff's alleged harms were specifically caused by exposure to the substances at issue and what value, if any, should be placed on each case.

Informal cooperation has not generally been successful for cases in this category. It is not uncommon to find a Superfund case in one court, contribution cases in another, personal injury and property damage in a third, and insurance coverage in a fourth. Judge Richard A. Enslin of the Western District of Michigan made an effort at a cooperative venture in

11. See Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 480 (1986); see also Schwartz, *supra* note 1, at 1702-03.

12. See MANUAL FOR COOPERATION, *supra* note 1, at 32-33.

13. See RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991); McGovern, *supra* note 9, at 675-88.

14. See Schwartz, *supra* note 1, at 1721-32; see also MANUAL FOR COOPERATION, *supra* note 1.

this type of a situation, but jurisdictional issues and differences in the interpretation of insurance contracts between state and federal courts inhibited his efforts.¹⁵ DES and Bendectin litigation are other examples of cases in this category that are difficult cases to coordinate.¹⁶

If there is multidistrict litigation treatment and a retention of jurisdiction by the transferee judge through either class action certification or other procedure (such as occurred in the litigation involving Agent Orange),¹⁷ then there may be formal coordination, perhaps in the face of opposition to informal cooperation.

E. Known Liability, Uncertain Specific Causation, Uncertain Value, and Uncertain Funding

Any mass tort that involves uncertain funding is the most difficult to handle under existing procedures. These cases may arise when a defendant has insufficient assets (except for contested insurance coverage), or when there are simply insufficient assets from all sources of revenue. In either event, the liability, specific causation, and value issues are held hostage to the funding question. It may very well be that the plaintiffs, defendant(s), and insurer, for example, all agree on the value of the underlying case, but cannot agree on who should pay what amount; or plaintiffs in one jurisdiction can receive no compensation because plaintiffs in another jurisdiction have preempted the expenditure of available funds.

Aside from the use of formal procedures, such as bankruptcy laws, there are few notable examples of cooperation among courts in these cases. When nontraditional procedures have been used, there has generally been resistance. When judges have been heavy handed, appellate courts have generally reacted negatively. There have been some efforts by the National Center for State Courts and the Federal Judicial Center to suggest standardized procedures for handling these mass tort cases.¹⁸ The proposals were created by a cooperative pooling of information by judges, but are rarely utilized in precisely the same manner.

15. See *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988), *vacated*, 1988 U.S. Dist. LEXIS 3560 (W.D. Mich.).

16. See ROBERTA J. APFEL & SUSAN M. FISHER, *TO DO NO HARM: DES AND THE DILEMMA OF MODERN MEDICINE* (1984); MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996); Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 *HASTINGS L.J.* 301 (1992).

17. See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987).

18. See *MANUAL FOR COOPERATION*, *supra* note 1.

II. JUDICIAL COOPERATION IN THE ASBESTOS LITIGATION

Numerous instances of cooperation among judges in the asbestos litigation have met with mixed results. At the present time, however, two major movements among federal and state judges across the country may herald new levels of cooperation. In order to appreciate these new efforts at cooperation, it is necessary to look at the backdrop of asbestos litigation.¹⁹

A. Background

Justifying our existing methodology for resolving the asbestos litigation is difficult, if not impossible. Plaintiffs see limited funds delayed and dissipated; defendants watch ongoing businesses weakened; insurance carriers contend with decreasing capacity; and judges endure increasingly clogged dockets. Attorneys for both plaintiffs and defendants, local plaintiff organizers and litigation experts—although lamenting the current state of affairs—are undeniable beneficiaries of the *status quo*. National decision-makers—legislators, the administration, unions, bar associations—stand by, unwilling to act.

The fundamental problems of asbestos litigation can be viewed in terms of a lack of coordination and consistency in the search for an ultimate solution. Thus, we find the following phenomenon occurring: plaintiffs' attorneys rush to their favorite judges and demand draconian procedures to pressure defendants to make block settlements. Then these plaintiffs' attorneys can get money for themselves and their clients before all available funds disappear. Defendants seek the opposite—delay is their nirvana. Traditional defendants facing the spectre of financial oblivion want to string out their available money, and hence their existence, as long as possible. Their tactics vary from "stonewalling"—forcing the plaintiffs to trial on every case—to "trickling"—providing just enough money to keep plaintiffs from trying cases that might result in blockbuster verdicts. Stonewallers have relatively high transaction costs but think they make up for this in low payments to plaintiffs. Tricklers believe that their approach results in lower net costs. The insurance overlay greatly informs the choice

19. See generally PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985); Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993); McGovern, *supra* note 3.

of tactics—companies with large available coverage and defense costs have different incentives from those with cash flow problems. The “new” defendants generally prefer the stonewalling approach to stem any breach in their defenses, although some of these defendants will settle cases in particularly threatening situations. Some judges add to the frenzy by pushing their own “solutions” so they can be viewed as master dispute resolvers.

There are case management and legislative models for resolving these kinds of mass torts, usually involving some type of consolidation procedure. The theory behind these models is to centralize decision making so that liability can be defined, assets can be maximized, transaction costs lowered, and compensation rationalized. In the Dalkon Shield litigation of the A. H. Robins Company, some 9500 cases were resolved in virtually every state over a period of fifteen years.²⁰ There were approximately fifty trials. When it appeared that there were not sufficient assets to cover the outstanding 5000 cases, the company filed for bankruptcy. Under bankruptcy procedures, all past and future claims were centralized and then the court estimated their total value. Once a cap was placed on the total value of those cases, the company was sold for fifty percent more than its previous valuation. A fund was established to assure that the claimants were compensated in a humane manner with minimal transaction costs. Arguably, the Dalkon Shield case exemplifies a case management approach of consolidation of cases, maximization of assets, and reduction of transaction costs. By centralized coordination, both sides of the case were in a better position; the coordination resulted in joint gains.

Another related model is legislative: the preemption of state law that mandates a national consolidation or alternative dispute resolution procedure. Black lung, DPT vaccine, and Price Anderson are examples.²¹ Although there has been arguably less success with these forms of consolidation, the aims of asset maximization, transaction cost minimization, and consistent compensation are identical.

Yet a third model arises out of the Connecticut apartment building collapse and the ensuing cooperation among judges.²² There, the judges accomplished informally the same functions as a bankruptcy court or legislature. First, they determined the total amount of liability, then they increased the amount of assets by innovative bargaining, and finally they

20. See SOBOL, *supra* note 13.

21. See Black Lung Benefits Act, 30 U.S.C. §§ 901–945 (1994); National Vaccine Compensation Program, 42 U.S.C. § 300aa-10 to -34 (1994); Price Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (codified as amended in scattered sections of 42 U.S.C.).

22. See Schwartz, *supra* note 1, at 1704, 1715–18.

distributed the funds as efficiently as possible. In addition, the judges had much more flexibility in putting together their package than would normally be the case. On the other hand, their flexibility had the potential for deviating from normally accepted standards of due process.

The asbestos litigation landscape is more complex in several respects than the examples cited above. There are more plaintiffs and more defendants. Some of the defendants have been in the litigation for years and are confronting a "mature" mass tort similar to the model of known liability, uncertain specific causation, known value, and uncertain funding. Other defendants are quite "new," and their liability, specific causation, value, and funding are all uncertain. There is no legal procedure or statute to force these cases into one forum for final resolution. And the litigation tail—the number of cases that might be brought in the future—is indeterminately long with a seemingly constantly changing disease mix.

In addition, the asbestos litigation is not uniform throughout the United States. In most jurisdictions, plaintiffs' attorneys have shown restraint by filing more serious cases in numbers that can be assimilated by the judicial process. Particularly when there is some collegiality among the members of the bar, these cases move remarkably well through the system using traditional judicial techniques. In a small number of other jurisdictions in which there have been either large numbers of more serious cases, or large numbers of marginal cases filed by less restrained plaintiffs' attorneys, or a combination of the two *and* a lack of traditional judicial resources to accommodate these large filings, there have been problems. Sometimes these problems are reduced by innovative judicial management procedures; sometimes they become more severe.

Notwithstanding these complexities, there has been a recognition among some participants in the asbestos litigation that coordination is desirable. In the mid-1980s, a major cooperative effort among plaintiffs, defendants, and insurance carriers sponsored by the Center for Public Resources resulted in the creation of the Asbestos Claims Facility (ACF).²³ The ACF succeeded in forging cooperation among a large group of defendants and carriers. However, it became unglued because of the legitimately different interests of some of the participants. The ACF was succeeded by the Center for Claims Resolution (CCR) whose membership appeared to have more consistent goals.²⁴ The rise and fall of the ACF

23. See Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13 (1990).

24. See Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 HARV. J. ON LEGIS. 383 (1993).

and the endurance of the CCR illustrate the potential for cooperation. But without the ability to reconcile disparate interests and seek a mutually satisfactory outcome, global cooperation among the parties will be difficult.

Unfortunately, the potential for the parties to obtain further coordination by themselves seems limited. Plaintiffs who feel they have an advantage to tap into existing assets first will not be proponents of cooperation. New defendants who are successfully staying on the periphery do not desire to be in the spotlight of consolidation. Some attorneys and organizers for plaintiffs and defendants will not have their status improved. Some judges whose reputations are made by unilateral actions will not have their status improved. And some politicians who fear controversy or a raid on the national treasury might not have their status improved. That is, key players in promoting cooperation may not find it in their own best interests to seek an overall solution.

B. Judicial Cooperation Since 1990

There is, however, a general recognition of enormous potential for cooperation among judges. Whether or not this cooperation will generate positive steps is subject to at least some questions. The recent history of cooperation in the asbestos cases among federal judges began in May 1990, when a group of federal district court chief judges met with the director of the Federal Judicial Center to request a meeting of federal judges in order to consider a national approach for resolving pending asbestos cases.²⁵ The center had previously held judicial conferences in 1984 and 1988, but the purpose of those meetings had been limited to a sharing of case management approaches. On June 5, 1990, letters were sent to the ten judges who had the largest number of asbestos cases inviting them to a conference at the Dolly Madison House. Four special masters, thirteen attorneys, three academics, and one state judge were also invited.

During the one-day conference on June 25, 1990, the participants heard background information on the asbestos litigation and suggested national strategies, options, and solutions. They were then divided into groups of judges, defense attorneys, and plaintiffs' lawyers to consider consensus alternatives to the existing methodology for resolving asbestos cases. As might have been suspected, the lawyers generally favored a speedier status quo, and the judges formed separate committees on alternative dispute resolution, case management, and legislation to consider further

25. See MANUAL FOR COOPERATION, *supra* note 1, at 32-34.

options. The lawyers were also requested to refine their ideas and report back to the group as a whole.

The case management committee, headed by Judge Thomas D. Lambros of the Northern District of Ohio, a long-time procedural innovator, began immediately to discuss coordinated action among federal and state judges. The legislative committee, under the leadership of Judge Robert M. Parker of the Eastern District of Texas, a staunch advocate of more radical solutions to resolving asbestos cases, began drafting proposed language to strengthen the role of the courts in handling these cases.

Contemporaneous with the Federal Judicial Center meeting, Judge Jack B. Weinstein of the Eastern District of New York considered the possibility of a national mandatory class action for all asbestos personal injury litigation.²⁶ Judges Lambros and Parker also had potential asbestos class actions pending in their courts. At another meeting at the Federal Judicial Center with the judges who had attended the earlier conference, the judges agreed to consolidate their pending class actions.

On September 27, 1990, Chief Justice William Rehnquist appointed an "Ad Hoc Committee on Asbestos Litigation of the Judicial Conference of the United States" to be headed by Judge Thomas S. Reavley of the Fifth Circuit Court of Appeals and Chairman of the Judicial Conference Committee on State-Federal Relations.²⁷ Judge Parker, as Chairman of the Judicial Conference Committee on Case Management, was also a member.

With the exception of Judge Weinstein and Judge Charles Sifton, also from the Eastern District of New York, the same federal judges who had previously met at the Federal Judicial Center met again on November 16, 1990, at the Dolly Madison House. They considered a series of options for devising a national asbestos litigation strategy and agreed to draft a letter to the Judicial Panel on Multidistrict Litigation (JPMDL) recommending that the asbestos cases be consolidated under section 1407²⁸ and that Judge Charles R. Weiner of the Eastern District of Pennsylvania be designated the transferee judge.²⁹ That letter was sent on November 21. On January 17, 1991, the panel issued an order with a hearing scheduled for May 30,

26. See *In re E. & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380 (E.D.N.Y. & S.D.N.Y. 1991).

27. See AD HOC COMM. ON ASBESTOS LITIG., REPORT OF THE JUDICIAL CONFERENCE (1991).

28. 28 U.S.C. § 1407 (1994).

29. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

1991, in New York City to show cause why the asbestos personal injury and wrongful death cases should not be consolidated. The federal asbestos cases were consolidated on July 29, 1991.³⁰

On March 12, 1991, the "Ad Hoc Asbestos Committee" filed its report with the Judicial Conference Committee and recommended that Congress enact legislation to assist in achieving a consolidation of cases in the courts.³¹ A dissent recommended a federalized compensation system in lieu of the existing tort approach.³²

Contemporaneous with the federal judicial efforts to achieve some level of cooperation among courts, various state judges were urging joint efforts. Judges Sandra Moss of Philadelphia, Helen Friedman of New York, and Marshall Levin of Baltimore began to organize a group of interested state judges.³³ Judge Levin had been invited to the June 25, 1990 meeting at the Federal Judicial Center and was asked to seek input from the state judiciary into the federal decision-making process. Through various efforts, the State Justice Institute agreed to fund a meeting of the National Center for State Courts for eleven state judges in Washington, D.C., on January 18, 1991.

At that meeting, U. S. district court Judges Charles Wolle of Iowa, Parker, and Weinstein presented a report on the status of asbestos litigation from a federal perspective. In addition, the state judges received reports from the National Center for State Courts on the state court asbestos litigation landscape and from an academic concerning various strategic and tactical options available to them. The state judges discussed their different approaches to managing asbestos litigation and decided they would pursue an effort to coordinate their activities. These meetings of state judges have evolved into a committee of the Conference of Chief Justices entitled the Mass Tort Litigation Committee (MTLC).³⁴

MTLC is currently composed of fifteen to twenty state trial judges who are all presiding over some variety of mass tort litigation—*asbestos, silicone gel breast implant, Norplant, lead paint, bone screws, and numerous others.* They meet four or five times a year to share ideas concerning mass tort case management. The State Justice Institute funded a conference in Cincinnati, Ohio, on November 10–13, 1994 to bring judges, academics,

30. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

31. See AD HOC COMM. ON ASBESTOS LITIG., *supra* note 27, at 36.

32. See *id.* at 41–43.

33. See MANUAL FOR COOPERATION, *supra* note 1, at 32–39.

34. See *id.*

and attorneys together to consider the mass tort phenomena and suggest further case management approaches. The *Resource Book for State Trial Judges* was created as a by-product of this cooperation.³⁵

III. JUDICIAL COOPERATION IN THE SILICONE GEL BREAST IMPLANT LITIGATION

When the federal silicone gel breast implant cases were consolidated by the Judicial Panel on Multidistrict Litigation for common pretrial multidistrict litigation (MDL) discovery before Judge Sam C. Pointer, Jr. of the Northern District of Alabama, he met with a committee of the MTLC to consider federal-state cooperation.³⁶ Eventually, the MTLC appointed a permanent committee to work with Judge Pointer, and he appointed a special master to assist with those coordination efforts.³⁷

When Judge Pointer scheduled pretrial conferences, usually in different cities around the United States, he customarily invited the local state judge who had silicone gel breast implant cases to sit with him. At the same time, Judge Pointer scheduled annual meetings of judges from each state in which silicone gel breast implant cases were pending to participate in an update concerning the progress of the MDL. The special master was made available to answer any questions from judges concerning the progress of the discovery in the MDL and to compile rulings made by judges around the United States on evidentiary and substantive issues.

The efforts to coordinate state and federal discovery included a national document depository, national depositions, national interrogatories of plaintiffs, and national evidentiary rulings. The federal court used the preexisting California interrogatories and answers in lieu of its own interrogatories. MDL and non-MDL attorneys were invited to participate in national depositions, and local discovery was deferred if there were duplicative notices. When appropriate, the depositions were memorialized on videotape.

Some effort was made to coordinate trial schedules to ensure that the scarcest resource at trial—expert testimony—was utilized effectively. At the same time, judges recognized the resource problems for law firms if multiple trials were scheduled at the same time.

35. See ALEXANDER B. AIKMAN, *MANAGING MASS TORT CASES: A RESOURCE BOOK FOR STATE TRIAL COURT JUDGES* (1995).

36. The author coordinated the meeting in his capacity as advisor to MTLC.

37. See Revised Case Management Order 5, *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (MDL 926) (last modified July 23, 1997) <<http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm>>.

When the parties developed a settlement and subsequently a revised settlement proposal, Judge Pointer organized a meeting in Memphis for all interested state judges to learn the details of the defendants' offer.³⁸ The special master organized teams of court neutrals to conduct seminars around the country to explain the program. All of this was done with the full cooperation of the state judges and sometimes with their attendance.

The special master has also coordinated alternative dispute resolution efforts for federal and state courts. In Oklahoma, for example, there is a program for local mediators to bring them up to speed concerning national developments and to support the most effective settlement processes in the silicone gel breast implant context.

IV. RULES FOR JUDICIAL COOPERATION

There are six principles that can arguably be derived from this brief review of cooperative efforts by judges. First, the more that is known about liability, specific causation, and value, the easier it is for judges to coordinate. The more controversial those issues, the more difficult it becomes. When there is little uncertainty in a case except for the amount of money to be paid, the parties seem more amenable to the efficiencies fostered by cooperation. The more avenues available to escape payment, the more eager the parties are to exploit differences and inhibit cooperation.

Second, the more the attorneys are in favor of cooperation among courts, the more likely there will be cooperation. Most studies underestimate the power of counsel in fashioning procedural decisions and the role of counsel as a natural constituency for both federal and state judges. A bar that is collegial and cooperative fosters joint activity by judges.

Third, the more formal the procedure for coordination, the more likely the coordination will occur. Informal cooperative procedures, although notably successful in some instances, are terribly difficult to implement.

Fourth, the larger the scope of cooperative effort, the greater the chances for success. Unless all issues are part of the effort, the independent issues tend to drive toward disunity.

Fifth, the sooner the cooperative effort begins in the litigation, the larger the role of that cooperation. Courts that have taken control of a case before the interests of attorneys, judges, and others have become vested, have much more opportunity to fashion an consensual approach.

38. See Rene Stemple Ellis, *The Silicone Gel Breast Implant Litigation Regional Information Meetings*, 2 WIDENER L. SYMP. J. (forthcoming Aug. 1997).

Sixth, the larger the number of jurisdictions in which cases are filed, and the greater the differences in law among them, the more obstacles there are to coordination. This seems to be obvious; the more items that need to be coordinated and the more different those items are, the more difficult the task.

V. NORMATIVE CONCERNS REGARDING COOPERATION AMONG JUDGES

The determination of appropriateness of cooperation among judges in mass tort litigation is complicated by the variety of normative yardsticks available for measurement and the differences in contexts in which that cooperation might occur. Among the normative approaches for evaluating the appropriateness of cooperative efforts are: (1) ethical concerns; (2) economic values; (3) federalism principles; (4) process issues; and (5) fairness interests.

Traditional rules of ethics are contained in the American Bar Association Code of Judicial Conduct, most notably Canon 3(B)(7) concerning *ex parte* communication,³⁹ and the Code of Conduct for United States Judges.⁴⁰ There are also postmodernist ethical concerns embodied in communicative and communitarian schools of thought⁴¹ that have led at least one federal judge to justify potential violations of the written standards of ethics in the pursuit of superior dispute resolution.⁴²

Economic values that may impact any normative determination of the appropriateness of cooperation among judges include an efficient use of judicial time and money and the search for "quality" outcomes.⁴³ There are also major economic considerations raised by error and opportunity costs, as well as any unexpected externalities and dislocation costs caused by deviating from standard operating procedures. These values become particularly problematic because of the difficulty of measuring them in the context of live litigation.

39. See MODEL CODE OF JUDICIAL CONDUCT (1990); see also Andrew L. Kaufman, *The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 855-59 (1989).

40. See 28 U.S.C. § 455 (1994).

41. See WEINSTEIN, *supra* note 1, at 46-52.

42. See *id.* at 51-52.

43. See McGovern, *supra* note 11.

Principles of federalism are generally viewed as critical aspects of any evaluation of judicial cooperation, particularly coordination between federal and state judges.⁴⁴ The social experimentation and legal interaction between federal and state courts—referred to as “intersystemic cross-pollination”⁴⁵—has had a rich history in American jurisprudence. At the same time, there is an equally strong tradition of independence among our courts⁴⁶—particularly in the area of tort law in which the states are generally sovereign. In fact, the ability of litigants to choose between federal and state courts has also been a critical aspect of our concept of federalism.⁴⁷ There is also a major institutional concern as to the most appropriate decision-making body for resolving any given dispute.⁴⁸ These concerns are often expressed in legal doctrines such as *res judicata*, collateral estoppel, and comity. All of these federalism concerns can be greatly affected by judges’ decisions to operate in tandem rather than as part of parallel systems.

Process issues focus on litigant satisfaction, including participation, autonomy, and dignity.⁴⁹ Given our adversarial mode of adjudication, the movement toward more inquisitorial styles of decision making by judges among themselves can create substantial problems with litigant satisfaction. These process issues can be particularly acute when the procedural rules for case management are tailored to each case rather than standardized, and the participation of counsel in decisions concerning case management is reduced.⁵⁰

Finally, there are major fairness interests associated with “quality” outcomes, predictability, rationality, equality of opportunity, and horizontal equity.⁵¹ Each time judges change their anticipated roles as fully independent actors because of perceived needs for judicial cooperation, there is a

44. See generally Symposium, *supra* note 1; Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769 (1992).

45. Redish, *supra* note 44, at 1774.

46. See *id.* at 1773–75.

47. See *id.* at 1775–78.

48. See *id.* at 1782–84.

49. See McGovern, *supra* note 11, at 453.

50. See *id.* at 442–49; see also MANUAL FOR COMPLEX LITIGATION, *supra* note 1.

51. See McGovern, *supra* note 11, at 453.

risk of dislocation based upon *ex ante* expectations. On the other hand, equality concerns may dictate that judges enhance cooperation to insure equivalent treatment of litigants.

The second set of variables in applying any normative yardstick is contextual. Judgments concerning the appropriateness of cooperative behavior among judges will vary according to the stage in the litigation process—pretrial, settlement, dispositive motions, and trial—as well as the nature and degree of the cooperation—communication, coordination, allocation of responsibility, or joint strategy. At the same time, the variety of interested publics—litigant, counsel, society, judges, and other governmental entities—will have a variety of different reactions. As a general rule, the more public, earlier, and the less outcome-determinative, the less the concerns. The more private, later, and the more conclusive, the greater the concerns. Efficiency will vary considerably depending upon the timing and nature of the cooperation.

Communication of public information among judges rarely seems to be a problem, but the more private, less susceptible to adversarial scrutiny, and more judgmental the communication, the greater the resistance. Perceptions by the various publics are particularly important here; even innocuous information sharing can create problems if, for example, an impending decision in one court is revealed first in another court.

Successful coordination of pretrial activities by reconciling overlapping schedules and eliminating redundancies in case development rarely present problems; the efficiency gains for everyone are simply too great. If, however, these coordination efforts generate a strategic advantage for any litigant, then there will be greater objection. For example, judges may agree that a deposition may be taken only by a certain set of attorneys or under the particularly onerous rules of one court or only on one occasion, thereby giving one or more parties an adversarial edge as opposed to normal practice. Under these circumstances, the normative concerns of process, federalism, and fairness may trump the efficiency values—even if handled in a completely ethical manner.

In the allocation of responsibility among judges, the reduction of duplication usually receives a favorable reaction. There are, however, instances in which the marketplace of litigation with a variety of seemingly duplicative energies may generate superior results.⁵² There seems to be less of a concern regarding the discovery phase of litigation, although the

52. See RICHARD A. POSNER, *AN ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); George L. Priest, *The Common Law Process and the Salvation of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

history of most mass torts suggests that the efforts by plaintiffs to obtain information from defendants become more successful over time.⁵³ The concepts of consolidated pretrial discovery under the MDL rules⁵⁴ and Rule 26(a)(1)⁵⁵ disclosure may be creating a new standard for reducing multiple rounds of pretrial discovery. Decisions to allocate responsibility for legal rulings, on the other hand, may be problematic if there is a perception that cooperation may alter outcomes. Discovery and privilege rulings are less of a concern because any given court can drive the disclosure engine, even in the absence of judicial cooperation. Ex post decisions to follow in the wake of earlier judicial decisions seem to receive more favorable reaction than ex ante announcements that a court will follow whatever another judge may decide without an independent review on the merits. On the other hand, a division of labor based upon federal-state responsibility seems to be reinforced by our shared concepts of federalism.

Cooperation in the strategy of judicial management is the most difficult type of cooperation to evaluate from a normative perspective. Generally, administrative cooperation is viewed favorably from ethical, economic federalism, process, and fairness perspectives. The issue is the definition of "administrative." In most cases, the administrative role of the judge is well defined and predictable. In mass torts, however, there is an expanding literature that suggests the role of the judge has been expanding—from umpire to manager to player. That is, the traditional model of the judge in handling one case at a time breaks down in the context of mass torts. The judge's managerial role in attempting to pursue horizontal equity for all plaintiffs in the face of insufficient resources to handle each case expeditiously has expanded sufficiently to transform the judge into the role of an actual player in the litigation.⁵⁶ By deciding to certify, or not to certify, a class action; by reverse bifurcating or not bifurcating a trial; by any of a number of initial "administrative" decisions, the judge may become the most important participant in the litigation. Concerns about the appropriate role of the judge can be exacerbated when multiple judges make the same "administrative" decisions, or conversely when one judge attempts to dominate the case management development in a given mass tort. One of the more difficult areas to analyze occurs when several judges seem to be coordinating "settlement strategies" to the perceived detriment of one or more parties. Although efficient, and even though pursued in accordance

53. See McGovern, *supra* note 3, at 1841–45.

54. See 28 U.S.C. § 1407 (1994).

55. See FED. R. CIV. P. 26(a)(1).

56. See McGovern, *supra* note 3, at 1838–41.

with normal ethical standards, these joint strategies may run afoul of other normative concerns.

CONCLUSION

There is almost universal support for cooperation among judges in mass tort litigation.⁵⁷ Asbestos, silicone gel breast implants, and other mass torts have served as catalysts for coordinated efforts in pretrial, settlement, and trial. Indeed, the innovativeness of these cooperative efforts match the novelty of the underlying litigation.

There are, however, both practical and normative limits to this judicial cooperation. An examination of several mass torts and an analysis of narrative yardsticks available to measure the appropriateness of judicial cooperation in the context of mass torts reveal some tentative guidelines to gauge conduct. The earlier and more comprehensive the cooperative intervention occurs in the litigation cycle, the greater the benefits and the less the resistance. The more openness, formality, uniformity, and predictability in the cooperative venture, the more acceptable it becomes. The greater the uncertainty, driven either by the merits of the underlying case or by the process used by judges, the more the resistance will be. The more the cooperation appears to be "administrative" rather than "substantive," the more it appears consistent with accepted procedure.

Above all, judges are becoming more sensitized to the potential downside of unlimited "cooperation" and are selecting more appropriate procedures and timing to maximize the value of their efforts without altering the fundamental landscape of an adversarial process. The enterprise of lawyers in bringing national mass tort litigation is now being met by judges taking a more thoughtful and global view of their roles in our judicial system.

57. See Schwartz, *supra* note 1, at 1732-33.